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No. 80-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner

v.

STATE OF ALABAMA AND STATE OF NEVADA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. FOR LEAVE TO FILE, AND MEMORANDUM AS AMICI CURIAE IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

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Pursuant to Rules 36 and 42 of this Court's rules, Grace Baptist Temple, Prattville, Alabama (hereinafter Grace) and the Alabama Christian Education Association, Inc. (hereinafter ACEA) hereby move for leave to file the attached amici curiae memorandum in response to the petition for a writ of certiorari previously filed herein by Ray Marshall, Secretary of Labor, and in support of the motion filed by the States of Alabama and Nevada for consolidation with No. 80-120.* ACEA is a non-profit

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* Counsel for Grace and ACEA requested Petitioner and Respondents to consent to the filing of the attached memorandum. The consent of Respondents Alabama and Nevada was granted but, as of the time the instant motion and memorandum were printed, Petitioner had not advised counsel for Grace and ACEA whether consent would be granted.

corporation formed to inform, represent and protect fundamental churches and their educational ministries in the State of Alabama. Grace is a non-profit corporation located in Prattville, Alabama, and a member of ACEA. Grace and ACEA (through its members) participated in the Fifth Circuit proceedings below by filing an amici curiae brief. They also participated in the administrative proceedings that were reviewed by the Fifth Circuit where they were allowed "interested party" status (the approximate equivalent of amicus curiae participation). Their participation was to the full extent allowed, intervention having been denied in both proceedings. With the consent of the parties or the permission of the Court, Amici intend to file an amici curiae brief on the merits in this case. The identities and interests of Amici and the bases for this Motion are explained further in the attached Memorandum.

The issues in the instant case are quite similar to the issues presented in another case already before the Court, No. 80-120, *St. Martin Evangelical Lutheran Church, et al.* v. *South Dakota.* However, the breadth and scope of the records in the two cases are dissimilar and Grace and ACEA, for reasons expressed in the attached memorandum, would show that their interests, and the interests of justice, require that the Court allow the filing of the attached memorandum and grant the relief requested therein.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Should this Court grant the Petition for a Writ of Certiorari to the Fifth Circuit, thereby accepting this case for plenary review of the substantive issues?

2. Should this Court consolidate for review the instant case and *St. Martin Evangelical Lutheran Church, et al.* v. *South Dakota,* No. 80-120?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. AS AMICI CURIAE IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

SUMMARY OF ARGUMENT

Resolution of the issues presented in this case will have a tremendous impact on churches throughout the United States, as well as non-church employers and the respective states. However, the two states in the United States with the most at stake are Alabama and Nevada. Only they have been held by the Secretary to be out of conformity with the requirements of FUTA. Should the Secretary's decision be reinstated, they will lose millions of dollars in federal funds. Employers in their states will lose hundreds of millions of dollars in tax credits. No other states face this risk. Alabama and Nevada should be allowed plenary participation in litigation of these is-

sues before this Court, because only they can present the arguments from the perspective of states which have resisted Secretary Marshall's interpretation of FUTA. The Court should accept this case for plenary review and consolidation with No. 80-120. Only then would the Court have presented to it the specific impact on two particular religious schools, as shown in No. 80-120, and the broad perspective of the many churches and denominations, as well as "non-conforming" states, as presented in the Fifth Circuit record.

ARGUMENT AND INTEREST OF AMICI

Grace Baptist Temple (Grace) and the members of Alabama Christian Education Association, Inc. (ACEA) are churches located in the State of Alabama. They are fundamental churches which believe in and obey the Bible as the inspired, literal, sensible and inerrant Word of God. They are predominantly independent Baptist churches, although several other denominations are included. As to the issues presented to the Court herein, their beliefs and practices are identical in all material respects.

Grace and the other members of ACEA operate Christian schools, among their other ministries. The Christian schools are entirely religious in scope, being motivated by religious considerations and maintained solely to accomplish religious objectives. All of their activities are conducted from a Biblical-Christian perspective with a spiritual emphasis.

Grace and the members of ACEA employ persons to supervise or teach in their Christian schools. None of the schools are separately incorporated or otherwise separate legal entities. All persons employed to work in the school ministries are employed by the respective churches and are church staff.

Petitioner, Ray Marshall, the Secretary of Labor of the United States, has asserted that the State of Alabama must collect unemployment taxes from churches which maintain Christian schools in order to be in conformity with the requirements of 26 U.S.C. § 3301 *et seq.*, the Federal Unemployment Tax Act (FUTA).

If Secretary Marshall's position is upheld, Grace and the members of ACEA will be subjected to taxation, contrary to the requirements of FUTA and contrary to their rights under the Constitution of the United States.

Therefore, the Alabama Christian Education Association, Inc. and Grace Baptist Temple, Prattville, Alabama, hereby support the position of the States of Alabama and Nevada urging that the Court accept this case for plenary review and consolidate the case with No. 80-120. ACEA and Grace hereby move on their own behalf that the Court enter an order which: (1) grants the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit thereby allowing plenary review of the decision of that court in *Alabama & Nevada* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980); and, (2) consolidates that case with *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota*, No. 80-120, which this Court has accepted for review.

As grounds for the motion, Amici would show:

1. This case and the South Dakota case involve similar questions, namely the correctness in terms of statutory construction and the validity under the Constitution of the Secretary's interpretation of FUTA. Under FUTA the Secretary purports to require that the states collect unemployment taxes from churches which operate religious schools as a condition to the states' receiving federal financial support for their unemployment compensation programs and federal tax credits for

employers in their respective states. This position has forced many states to attempt to collect unemployment taxes from churches in violation of their rights under the Constitution.

2. The questions are of vital interest to every state, there being millions of dollars of federal funding for state programs lost when the Secretary finds a state out of conformity with the requirements of FUTA. Millions of employers throughout the United States could be adversely affected if their respective states' unemployment compensation programs are held out of conformity with FUTA, because such a holding will cause the employers to lose entitlement to substantial tax credits that are available where the state program is in conformity with FUTA.

3. Amici churches and many other churches and denominational groups which operate religious schools will be directly affected by the outcome either by the collection of millions of tax dollars from them or by the devastating train of legal consequences which will necessarily follow from their refusal, in some cases, to submit voluntarily to taxation of their ministries.

4. In the proceedings below, the Fifth Circuit set aside the Secretary's interpretation of FUTA as erroneous, thereby deciding federal questions in a way in conflict with a state court of last resort. *Compare Alabama & Nevada* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980), *with In re Northwestern Lutheran Academy*, 290 N.W.2d 845 (S.D. 1980), *cert. granted sub nom. St. Martin Evangelical Lutheran Church, et al.*, v. *State of South Dakota*, No. 80-120 (U.S., Nov. 3, 1980). Numerous other courts, including another state court of last resort, have rendered decisions in accord with that of the Fifth Circuit and in contrast to that of the Supreme Court of South Dakota. *See, e.g., Grace Lutheran Church* v. *North Dakota Employment Security Bureau*, 294 N.W.2d 767 (N.D. 1980).

5. The case before the Fifth Circuit had the participation as amici curiae of many churches and religious groups, including amici churches herein which are independent, fundamental churches, the Lutheran Church-Missouri Synod, the United States Catholic Conference and the Association of Christian Schools International. These organizations were involved in preparing the stipulated facts which form the basis for the record in the Fifth Circuit, as well as presentations of legal briefs and argument. The record in the Fifth Circuit case therefore presents a broad and widely applicable perspective of the effect upon church-operated schools if the Secretary's position herein is upheld. The South Dakota case involved only two schools and focused on the facts as applied to them only.

6. It would be beneficial to the Court to examine the issues from the broadly based, and more widely applicable perspective as presented in the Fifth Circuit case in addition to the narrowly drawn perspective presented in the South Dakota case, before deciding the questions presented in these cases.

7. Only Alabama and Nevada have been ruled out of conformity by the Secretary. Proceedings were pending against at least eight other states but they were continued due to procedural problems. While the Secretary's decision was set aside by the Fifth Circuit, a contrary ruling by this Court in No. 80-120 could ultimately effect a reinstatement of the Secretary's holding. Should that occur, Alabama and Nevada, but not South Dakota or any other state, will face economic disaster.

CONCLUSION

The need for a complete record and presentation of arguments from the perspectives of all who will be affected, along with considerations of fundamental fairness, require that this Court grant the Petition for a Writ of Certiorari, consolidate this case with No. 80-120 and allow a plenary review of the issues presented.

Respectfully submitted,

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Attorneys for Grace Baptist Temple, Prattville, Alabama and Alabama Christian Education Association, Inc.

CERTIFICATE OF SERVICE

I, David C. Gibbs, Jr., do hereby certify that three copies of the above and foregoing Motion and Memorandum have been served this 9th day of December, 1980, by hand on Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for Secretary of Labor Ray Marshall, and Allen R. Snyder, Esq., Hogan & Hartson, 815 Connecticut Avenue, Washington, D.C. 20006, Counsel for States of Alabama and Nevada; and by regular U.S. mail, postage prepaid, on E. Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, Counsel for Petitioners in No. 80-120; and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, Counsel for Respondent in No. 80-120.

DAVID C. GIBBS, JR.